

§ 202.9

(f) *Examination Information for Broker-Dealers, Transfer Agents, Investment Advisers and Investment Companies.*

[62 FR 4105, Jan. 28, 1997]

§ 202.9 Small entity enforcement penalty reduction policy.

The Commission's policy with respect to whether to reduce or assess civil money penalties against a small entity is:

(a) The Commission will consider on a case-by-case basis whether to reduce or not assess civil money penalties against a small entity. In determining whether to reduce or not assess penalties against a specific small entity, the following considerations will apply:

(1) Except as provided in paragraph (a)(3) of this section, penalty reduction will not be available for any small entity if:

- (i) The small entity was subject previously to an enforcement action;
- (ii) Any of the small entity's violations involved willful or criminal conduct; or
- (iii) The small entity did not make a good faith effort to comply with the law.

(2) In considering whether the Commission will reduce or refrain from assessing a civil money penalty, the Commission may consider:

- (i) The egregiousness of the violations;
- (ii) The isolated or repeated nature of the violations;
- (iii) The violator's state of mind when committing the violations;
- (iv) The violator's history (if any) of legal or regulatory violations;
- (v) The extent to which the violator cooperated during the investigation;
- (vi) Whether the violator has engaged in subsequent remedial efforts to mitigate the effects of the violation and to prevent future violations;
- (vii) The degree to which a penalty will deter the violator or others from committing future violations; and
- (viii) Any other relevant fact.

(3) The Commission also may consider whether to reduce or not assess a civil money penalty against a small entity, including a small entity otherwise excluded from this policy under paragraphs (a)(1) (i)-(iii) of this section, if the small entity can demonstrate to

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the Commission's satisfaction that it is financially unable to pay the penalty, immediately or over a reasonable period of time, in whole or in part.

(4) For purposes of this policy, an entity qualifies as "small" if it is a small business or small organization as defined by Commission rules adopted for the purpose of compliance with the Regulatory Flexibility Act.¹ An entity not included in these definitions will be considered "small" for purposes of this policy if it meets the total asset amount that applies to issuers as set forth in § 230.157a of this chapter.²

(b) This policy does not create a right or remedy for any person. This policy shall not apply to any remedy that may be sought by the Commission other than civil money penalties, whether or not such other remedy may be characterized as penal or remedial.

[62 FR 16079, Apr. 4, 1997]

PART 203—RULES RELATING TO INVESTIGATIONS

Subpart A—In General

Sec.

203.1 Application of the rules of this part.

¹Pursuant to the Reg. Flex. Act, 5 U.S.C. § 601(3), the Commission has adopted appropriate definitions of "small business" for purposes of the Reg. Flex. Act. See 17 CFR 270.0-10, 275.0-7, 240.0-10, 230.157, 250.110, and 260.0-7. The Commission recently proposed amendments to certain of these definitions. *Definitions of "Small Business" or "Small Organization" Under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and the Securities Act of 1933*, Securities Act Rel. No. 7383, 62 FR 4106 (Jan. 28, 1997). The Commission extended the comment period for the proposed amendments to April 30, 1997, 62 FR 13356 (Mar. 20, 1997). Based on an analysis of the language and legislative history of the Reg. Flex. Act, Congress does not appear to have intended that Act to apply to natural persons (as opposed to individual proprietorships) or to foreign entities. The Commission understands that staff at the Small Business Administration have taken the same position.

²At present, this threshold is \$5 million. Thus, non-regulated entities, such as general partnerships, privately held corporations or professional service organizations, with assets of \$5 million or less may qualify for penalty-reduction.